

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 67

**HORACE A. YOUNG, BETTY JEAN GILBERT AND
PATSY MARIE GILBERT, MOTHERS OF MRS. EDNA MAT-
THEWS GILBERT, DECEASED, AND AS NEXT FRIENDS
CORBIN DESMUKES AND GARALDINE DESMUKES
ROBERTS,**

Petitioners

vs.

**ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER,
MID-CONTINENT PETROLEUM CORPORATION AND
THE GARTER OIL COMPANY, A Corporation,**

Respondents

**PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF ARKANSAS, AND BRIEF IN
SUPPORT THEREOF.**

**C. E. WRIGHT,
HENRY B. WHITLEY,
DUVAL L. PURKINS,**

**WILSON and KIMPEL,
Counsel for Petitioners.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 834

HORACE A. YOUNG, BETTY JEAN GILBERT AND
PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MAT-
THEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND;
CORBIN DISMUKES AND GARALDINE DISMUKES
ROBERTS, *Petitioners,*

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER,
MID-CONTINENT PETROLEUM COPORATION AND
THE CARTER OIL COMPANY, A CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Horace A. Young, Betty Jean Gilbert and Patsy Marie Gilbert, minors, by Mrs. Edna Matthews Gilbert, their tutrix and as next friend; Corbin Dismukes and Garaldine Dismukes Roberts, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioners herein, plaintiffs in the state courts, are attempting to obtain trial of their cause of action on its merits. In all of the proceedings in the Federal Court and in the state courts, there has been no trial on the merits of peti-

tioners' cause of action. Valuable property of petitioners has been appropriated by persons having no lawful claim thereto and petitioners have been refused their right to a trial on the merits of this case. Petitioners have not been guilty of laches or neglect. Their cause of action, *i. e.*, their right to the property, was acquired upon the death of Mary Christine Pace, non compos mentis, on December 27, 1939. Petitioners first brought action on this cause December 26, 1941, not quite two years after accrual of their cause of action. From the date of filing of the original suit in 1941 until this date, petitioners have continuously and vigorously pursued their remedy in the federal and state courts.

A chronological table of the efforts to litigate this matter will, we believe, be of help to the court in understanding just what issue is before it.

December 26, 1941—The Gilberts brought an action in the U. S. District Court for the Western District of Arkansas, El Dorado Division, against appellees, in which Horace A. Young intervened.

December 24, 1942—Action by Horace A. Young et al. against appellees brought in the U. S. District Court for the Western District of Arkansas, El Dorado Division. This action was brought because it was realized that the intervention of Horace A. Young in the suit by the Gilberts was an error.

April 14, 1943—Original action started December 26, 1941, in which Horace A. Young was intervener, dismissed for lack of jurisdiction.

September 14, 1943—Action begun on December 24, 1942 by Horace A. Young et al. dismissed for lack of jurisdiction.

May 9, 1945—*Young v. Garrett* affirmed by Circuit Court of Appeals.

August 8, 1945—Rehearing denied and case remanded to U. S. District Court with orders to permit appellees to

apply for leave to amend for the purpose of stating jurisdiction.

February 28, 1946—District Court denied appellants' motion to amend, thus exhausting the last suggestion for relief by the Circuit Court of Appeals.

September 19, 1946—Appellants, Horace A. Young et al., brought present action in Columbia Chancery Court.

February 25, 1947—Circuit Court of Appeals affirmed District Court's actions in denying appellants' motion to amend.

March 12, 1947—Columbia Chancery Court dismissed plaintiffs' complaint, holding as its reason for so doing that the action was barred by the one-year limitation as to new suits after nonsuit as contained in Section 8947 of Pope's Digest.

January 19, 1948—The Supreme Court of Arkansas affirmed the Columbia Chancery Court and applied Rule 60B of the Federal Rules of Civil Procedure to the interpretation of the Arkansas statute digested in Section 8947 of Pope's Digest.

March 1, 1948—Supreme Court of Arkansas denied petitioners' petition for rehearing.

The matter in the state court, which was determined so disastrously for petitioners, was, in fact, a federal question and should, we believe, alone be sufficient to give this Court jurisdiction. That issue was a question as to when the nonsuit in Federal court should be held to have been suffered. If it was suffered within one year before the bringing of the action in the State court, then, under the provisions of Section 8947 of Pope's Digest of the Statutes of Arkansas, the action in the state court was proper and within the period of limitations and the rulings of the Chancery Court of Columbia County, Arkansas and of the Supreme Court of Arkansas were wrong and violated several clauses of the Federal Constitution, to be later discussed in detail.

Reasons Relied upon for the Allowance of the Writ

1. The State courts, in effect, wrongly determined that the order of August 8, 1945, by the U. S. Circuit Court of Appeals for the 8th Judicial Circuit, denying rehearing of the appeal in *Young et al. v. Garrett et al.* and remanding the case to the U. S. District Court with orders to permit appellees to apply for leave to amend for the purposes of stating jurisdiction, was a final order allowing no further proceedings in the Federal courts and constituted, as of August 8, 1945, a nonsuit in Federal court. The very important question as to when the nonsuit was suffered in Federal Court is a matter proper for determination by the Supreme Court of the United States and when wrongly determined by the State court, is a proper matter for invocation of the remedy of certiorari.

2. In ignoring the portion of the order, dated August 8, 1945, of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit wherein the court remanded the case to the District Court with orders to permit appellees to apply for leave to amend their complaint for the purpose of stating jurisdiction, the Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas failed and refused to give full faith and credit to the order of that court, which constituted a violation of Article IV, Section 1 of the Federal Constitution.

3. The Supreme Court of Arkansas, in its opinion affirming the decree in the Columbia Chancery Court, based its findings on its interpretation of Rule 60B of the Federal Rules of Civil Procedure and its application of that rule to the interpretation of a state statute (Section 8947 of Pope's Digest). For this reason the decision of the Arkansas Supreme Court constitutes a violation of the por-

tion of the Federal Constitution providing for delegation of powers to the federal government and reservation of powers to the state governments. In addition, such use of this rule extends the provisions of the Federal Rules of Civil Procedure beyond the specific limitation placed thereon by the statute (28 U. S. C. A. Sec. 723(b)) authorizing the promulgation of the rules.

4. The question presented to the Supreme Court of Arkansas by the appeal perfected by petitioners herein posed one major problem for determination by the Supreme Court of Arkansas; i.e., "When was the nonsuit in Federal Court suffered?" If the nonsuit in Federal Court was suffered less than one year prior to bringing of the action in the state court, the state court action could not be barred by limitation by reason of Section 8947 of Pope's Digest of the Statutes of Arkansas. Despite the fact that this was the basic problem presented to the Supreme Court of Arkansas, that court refused to determine the issue and affirmed the judgment of the lower court without determination of the only issue which could have warranted an affirmation, and, by this action, it deprived petitioners of their property without due process of law, in violation of Amendment XIV to the Federal Constitution.

5. The Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas both refused to determine the status of the claim of Patsy Marie Gibert and Betty Jean Gilbert, minors, but, instead, denied them the right, guaranteed under the laws of Arkansas, to prosecute their claim at any time within three years after they become of age, such denial having the effect of taking from them their property without due process of law, in violation of Amendment XIV to the Federal Constitution.

6. The decision of the Supreme Court of the State of Arkansas rendered January 19, 1948 overlooks a funda-

mental principle of law and deprives the appellants of the right to their property without due process of law and in violation of Amendment XIV to the Federal Constitution, in that it denies to petitioners the benefits of the nonsuit statute as digested in Section 8947 of Pope's Digest.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8290, Horace A. Young et al., Appellants, vs. Levi Garrett et al, Appellees, and that the said judgments of the Chancery Court of Columbia County, Arkansas, and the Supreme Court of Arkansas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HORACE A. YOUNG,
 BETTY JEAN GILBERT and
 PATSY MARIE GILBERT, *minors*,
by Mrs. Edna Matthews Gilbert,
their tutrix and as next friend.

CORBIN DISMUKES,
 GARALDINE DISMUKES ROBERTS,
Petitioners.

By C. E. WRIGHT,
 HENRY B. WHITLEY,
 DUVAL L. PURKINS,
 WILSON & KIMPEL,
Counsel for Petitioners.
 per :

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 834

HORACE A. YOUNG; BETTY JEAN GILBERT AND
PATSY MARIE GILBERT, MINORS, BY MRS. EDNA
MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND;
CORBIN DISMUKES AND GARALDINE DISMUKES
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vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER,
MID-CONTINENT PETROLEUM CORPORATION
AND THE CARTER OIL COMPANY, A CORPORATION,
Respondents

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

The Opinion of the Court Below

The opinion of the Supreme Court of Arkansas, dated January 19, 1948, has not been officially reported at this time. The opinion appeared in The Law Reporter, Vol. 87, page 585.

II

Jurisdiction

1. Petition for Rehearing was denied by the Supreme Court of Arkansas on March 1, 1948.

2. As grounds for the jurisdiction of the Supreme Court of the U. S., petitioners rely upon six points, which, stated briefly, are as follows:

(1) Failure of the state courts to properly determine when the nonsuit in Federal Court was suffered; (2) Failure of the state courts to give full faith and credit to the decree of the U. S. Circuit Court of Appeals; (3) Application by the Supreme Court of Arkansas of Rule 60B to the interpretation of a state statute, thus extending the application of the rule beyond the power delegated to the Federal Government under the Constitution, and specifically extending the application of the rule beyond the limitations placed thereon by the statute authorizing promulgation of the rules; (4) Affirmance by the Supreme Court of Arkansas of the opinion of the lower court, although refusing to determine the issues involved, thus, taking from petitioners the right of review guaranteed them under the Constitution and laws of Arkansas, which constituted taking their property without due process of law; (5) Refusal of the state courts to determine the status of the claim of the minors involved in this litigation and foreclosing their rights without a trial on the merits thereof, as guaranteed to minors under the Constitution and laws of Arkansas, said action constituting taking their property without due process of law in violation of the Federal Constitution; and (6) Refusal of the state courts to grant petitioners equal protection under the laws of Arkansas and taking their property without due process of law in violation of the Federal Constitution in that the decision denies to petitioners the benefit of the Arkansas nonsuit statute.

The points relied on above were urged in the state courts as soon as they arose. Points 1, 5 and 6 were all urged in the Columbia Chancery Court. Points 2, 3 and 4 did not arise until the Supreme Court of Arkansas rendered its

decision. In the petition for rehearing filed by petitioners herein, the petitioners relied upon *all* of the above stated constitutional grounds and seriously contended that they be granted a rehearing of their cause in order that the above constitutional issues could be settled. This petition for rehearing was denied and overruled without comment on March 1, 1948.

3. Jurisdiction of this court is invoked under the authority of Section 237 of the Judicial Code as amended, Sub-Paragraph B, on the following grounds:

(a) As to petitioners' first and second bases for their petition for Writ of Certiorari, the Supreme Court of Arkansas denied full force and effect to the decree, dated August 8, 1945, of the U. S. Circuit Court of Appeals, 8th Judicial Circuit, and thereby violated Article IV, Section 1 of the Federal Constitution.

(b) As to petitioners' third basis for their petition for Writ of Certiorari, the opinion of the Supreme Court of Arkansas affirming the decision of the Chancery Court of Columbia County, Arkansas, constituted a violation of that portion of the Federal Constitution delegating to the Federal Government certain powers and reserving to the state government certain powers, in that it invoked a rule of federal procedure in interpretation of a state statute and placed upon the federal statute an interpretation which, if proper, would render said statute unconstitutional as an encroachment by the federal government upon powers reserved to the states.

(c) As to the petitioners' bases No. 4, 5, and 6 for their petition for Writ of Certiorari, the decree of the Chancery Court of Columbia County, Arkansas, and its affirmation by the Supreme Court of Arkansas constituted a violation of Amendment XIV to the Federal Constitution, in that

said decree and affirmation deprived petitioners of their property without due process of law.

It is specifically set up and claimed by petitioners that their rights, titled or privileged, under the Constitution of the United States as set forth in Article IV, Section 1 and Amendment XIV thereof, have been violated, and that said rights have been violated by the actions of the Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas.

4. It is believed that the following cases sustain the jurisdiction of this court:

Baltimore & Ohio Railroad Co. v. Maryland, 22 L. Ed. 446, 20 Wall. 643;

Iowa-Des Moines National Bank v. Bennett, 76 L. Ed. 265, 284 U. S. 239;

Miedreich v. Lauenstein, 58 L. Ed. 584, 232 U. S. 236;

Nutt v. Knut, 50 L. Ed. 348, 200 U. S. 12;

Radio Station WOW, Inc., et al. v. Johnson, 89 L. Ed. 2092, 326 U. S. 120;

Rogers v. Hennepin, 60 L. Ed. 594, 597, 240 U. S. 184;

West Side Belt Railroad Co. v. Pittsburgh Constr. Co., 55 L. Ed. 107, 110, 219 U. S. 92.

III

Statement of the Case

NOTE: A full statement of the case has been given under heading "A" in the Petition for Writ of Certiorari herein, and in the interest of brevity the statement will not be repeated under this point.

IV

Specification of Errors

1. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in determining,

in effect, that the order of August 8, 1945 of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit was a final order, completing plaintiffs' remedy in the Federal courts and constituting a nonsuit. In so doing, these courts denied any effect to the portion of that order remanding the case to the U. S. District Court with orders to permit appellees to apply for leave to amend their complaint for the purpose of stating jurisdiction, thereby denying full faith and credit to the order of the U. S. Circuit Court of Appeals for the 8th Judicial Circuit, in violation of the Federal Constitution.

2. The Supreme Court of Arkansas erred in using Rule 60B of the Federal Rules of Civil Procedure to limit the remedial effect of the Arkansas statute digested in Section 8947 of Pope's Digest of the Statutes of Arkansas, thus violating the portion of the Federal Constitution providing for the separation of the powers of the state and federal governments.

3. The Supreme Court of Arkansas erred in extending the application of Rule 60B of the Federal Rules of Civil Procedure beyond the specific limitations placed thereon by the statute authorizing promulgation of the rules.

4. The Supreme Court of Arkansas refused to determine the only real issue before it when it refused to determine when the nonsuit in Federal Court was suffered, and by affirming the judgment of the lower court without determining this issue, it deprived plaintiffs of their property without due process of law.

5. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in refusing to consider the rights of the minors, Patsy Marie Gilbert and Betty Jean Gilbert, which rights were protected under the laws of Arkansas, and, by foreclosing their rights without determination thereof, these courts deprived the minors,

Patsy Marie Gilbert and Betty Jean Gilbert, of their property without due process of law.

6. The Chancery Court of Columbia County, Arkansas and the Supreme Court of Arkansas erred in denying plaintiffs the equal protection of the laws of the State of Arkansas in that it denied them the benefit of the Arkansas nonsuit statute as digested in Section 8947 of Pope's Digest.

V

ARGUMENT

Summary of Argument

POINT A. THE NONSUIT SUFFERED IN FEDERAL COURT WAS NOT SUFFERED ON AUGUST 8, 1945.

POINT B. RULE 60B OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD NOT HAVE BEEN USED IN THE INTERPRETATION OF A STATE STATUTE.

POINT C. VIOLATION OF THE "DUE PROCESS OF LAW" CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

POINT A

The Nonsuit in Federal Court

The Arkansas nonsuit statute provides:

"If any action shall be commenced within the time respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action within one year after such nonsuit suffered or judgment arrested or reversed (a). Provided, if after judgment for plaintiff the same be reversed on appeal or writ of error, and said cause is remanded for another trial, the mandate shall be taken out and filed in the court from which the appeal is taken, within one year from rendition of the judgment of reversal; otherwise said cause shall be

forever barred; and if the cause of such action survive to his heirs or survive to his executors or administrators, they may in like manner commence a new action or take out a mandate within the time allowed such plaintiff." (Section 8947 of Pope's Digest of the Statutes of Arkansas.)

This statute has been held by the state court to be remedial in nature. *Love v. Cahn*, 124 S. W. 259, 93 Ark. 215; *Dressler v. Carpenter*, 155 S. W. 108, 107 Ark. 353; *State Bank v. Magness*, 11 Ark. 343.

In the case of *State Bank v. Magness*, *supra*, the Supreme Court of Arkansas, in determining the purpose of the nonsuit statute, stated:

"It is quite apparent that the intention of the framers of the Act (Act 159 of Acts of Arkansas, 1891, said act being digested in Section 8947 of Pope's Digest) was to secure that class of suitors from loss who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined, by giving them a reasonable time in which to renew such action. . . . The remedy was evidently intended to be co-extensive with the evil, and will be so held, unless some sensible reason to the contrary can be shown."

A nonsuit cannot be deemed to have been suffered until a final adjudication of the action. Thus, the nonsuit in the Federal Court in the case at bar would not have been deemed to have been suffered on September 14, 1943 when the District Court dismissed the case for lack of jurisdiction, for there was yet a further adjudication to be had. This adjudication was had by an appeal to the Circuit Court of Appeals on this case. On May 9, 1945 the decision was affirmed by the Circuit Court of Appeals, but this did not end plaintiffs' remedy in Federal Court. Plaintiffs then

filed a petition for rehearing in the Circuit Court of Appeals and on August 8, 1945, this petition for rehearing was denied, *but* the Circuit Court of Appeals, instead of completing its proceedings by a final order, remanded the case to the U. S. District Court with orders to permit appellees to apply for leave to amend for the purpose of stating jurisdiction.

That the Circuit Court of Appeals had authority to remand the case to the lower court is beyond question. In 3 Am. Jur. 679, Section 1169 (Appeal and Error) it is said:

“• • • the appellate court may, upon affirming a judgment, terminate the litigation by entering final judgment. On the other hand, in cases where the ends of justice would be promoted, the courts generally have power to remand the cause for further proceedings.”

This, then, was not the *final* adjudication of plaintiffs' rights in Federal Court. It was not until February 28, 1946, at which time District Court denied appellants' motion to amend, that the door was closed in plaintiffs' faces. Indeed, it might be said that it was not until February 25, 1947, when the Circuit Court of Appeals affirmed the District Court's order denying appellants' motion to amend, that the nonsuit was actually suffered; but in all events, in view of the subsequent litigation, all of which arose out of the order of the Circuit Court of Appeals remanding the case to the District Court, surely, it cannot be said that the nonsuit was suffered August 8, 1945.

To hold that the nonsuit was suffered on August 8, 1945 would, in effect, deny validity of the order of the Circuit Court of Appeals remanding the case. Such a holding would penalize plaintiffs for proceeding as they were directed to proceed by the Circuit Court of Appeals and would destroy the confidence of the public in the orders of such courts.

The ruling by the state courts constituted a violation of the full faith and credit clause of the Federal Constitution.

This issue was properly raised in the Chancery Court of Columbia County, Arkansas in the plaintiffs' amended and substituted complaint in equity (R. 40 et seq). The issue was wrongly determined by the Columbia Chancery Court when it stated:

"The court is of the opinion and finds that the order of the U. S. Circuit Court of Appeals entered by that court on the 8th day of August, 1945 was a final order by that court * * *" (R. 65).

"As before stated, this court finds as a matter of law, that the one year statute (nonsuit statute) began to run from the 8th day of August, 1945 * * *" (R. 65).

The Supreme Court of Arkansas, in effect, adopted the same interpretation, and thus became a party to the denial of full faith and credit to the portion of the order of the Circuit Court of Appeals remanding the case to the District Court, when it affirmed the lower court's opinion. (R. 68 et seq.) Although the Supreme Court of Arkansas did not specifically determine this issue, it must be held to have done so, inasmuch as the only reasonable interpretation of the affirmance by it of the lower court's decree would necessarily be on the ground that the nonsuit was suffered August 8, 1945. The court, in refusing to rule on this issue, stated:

"If (the decision of the U. S. Court of Appeals on August 8, 1945 is) treated as a nonsuit—an issue we do not decide—more than a year elapsed before the Chancery suit was filed in September of the following year." (R. 73.)

This error on the part of the state courts and the consequent constitutional issue was pointed out to the Supreme Court of Arkansas in Petitioners' petition for rehearing and brief, but it was ignored. The point, however, was discussed by the Supreme Court and although the court spe-

cifically stated that it made no determination, it did recognize the problem and the effect of its decision was a denial on this ground. Inasmuch as the point was discussed and, for all purposes, decided by the State Supreme Court, under the authority of *Miedreich v. Lauenstein*, 58 L. Ed. 584, 232 U. S. 236, it cannot now be denied that the Federal question was properly raised.

POINT B

Use of Federal Rules of Civil Procedure in Interpretation of the State Statutes

This point, as a constitutional ground and a ground for federal jurisdiction, was not in issue until the Supreme Court rendered its opinion in the case of *Young et al. v. Garrett et al.* on January 19, 1948. Petitioners, in their petition for rehearing and brief, urged that the Supreme Court of Arkansas had committed an error that constituted a violation of the Federal Constitution, and that, in addition, they had extended the effect of the federal statute promulgating the Federal Rules of Civil Procedure beyond the limitations contained in the statute itself. Petitioners' contentions, however, were ignored and their petition for rehearing was denied without opinion. Under such circumstances, the issue was raised in due time, for it was raised as soon as the error was committed and the constitutional question arose. (*Radio Station WOW, Inc., et al. v. Johnson*, 89 L. Ed. 2092, 326 U. S. 120 (Headnote 4)).

In its decision, the Supreme Court discussed at length Rule 60B of the Federal Rules of Civil Procedure, and applied this rule to the case at bar as a criterion for determining whether the appellants were entitled to the benefits of the statute digested in Section 8947 of Pope's Digest. It was the court's opinion that this federal rule effectively precluded application of that section in the case at bar, and

that, because of Rule 60B, appellants were not entitled to a trial on the merits of the case.

The Federal Rules of Civil Procedure were promulgated pursuant to an act of Congress effective in 1934, which act is codified under Title 28, U. S. C. A., Section 723B. This statute states specifically that:

“Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.”

The rules are, as stated in the act:

“* * * for the District Courts of the United States and for the courts of the District of Columbia * * *.”

These rules are not applicable to state courts and can have no effect whatever in interpretation or limitation of a state statute. Under our constitutional form of government, the legislative powers of the government are divided into two spheres: (1) that delegated to the Federal Government, as set out in the Constitution, and in the statutes enacted by the Congress of the United States, when constitutional, and (2) that reserved to the states. These rules of civil procedure are neither a part of the Constitution nor do they have statutory effect insofar as they affect laws of the states. The Supreme Court of Arkansas, in its decision handed down on January 19, 1948, determined that Rule 60B of the Federal Rules of Civil Procedure limited the application of the Act of April, 1891, p. 280, which is the act digested in Section 8947 of Pope's Digest, insofar as that statute is applicable to nonsuits suffered in Federal Court.

On page 374 of Title 28, U. S. C. A., it is stated:

“These rules (the Federal Rules of Civil Procedure) are applicable only to proceedings in federal courts, and cannot be applied to practice or procedure in state courts, *nor affect rights of parties in such courts.*” (*Rader v. Baltimore & O. R. Co.*, C. C. A. Ill. 1940, 108

F. (2d) 980, certiorari denied, *Baltimore & O. R. Co. v. Rader*, 1940, 60 S. Ct. 722, 309 U. S. 682, 84 L. Ed. 1026). (Italics ours.)

The interpretation which the Supreme Court of Arkansas has placed on Rule 60B of the Federal Rules of Civil Procedure in its decision in the case at bar has the effect of denying petitioners a right to a trial on the merits of their case, in direct contravention of a statute of the State of Arkansas granting them the right to such a trial. In other words, the effect of the Arkansas Supreme Court's decision is to construe the federal rules as a limitation to the liberal remedial effects of the state statute (Section 8947 of Pope's Digest). In addition to being contrary to the Federal Statute authorizing promulgation of the rules, such an interpretation violates the very purpose for which the rules were designed. The court's attention is directed to several citations found in 28 U. S. C. A. pages 372-375 in which Federal Courts have determined the purpose of the rules:

"The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice; to provide efficient machinery for the ascertainment of truth; and to expedite a termination of each controversy on the merits.' Alexander Holtzoff, Special Assistant to the Attorney General, 26 A. B. A. Jour. 45." (Italics ours.)

"The purpose of the Federal Rules of Civil Procedure is to cut through the maze of technicalities which have heretofore existed, and to enable the court to do a greater measure of moral justice under the law. *Mackere v. New York Cen. R. Co.*, D. C., N. Y. 1940, 1 F. R. D. 408." (Italics ours.)

"These rules are intended to liberalize procedure and to avoid harshness of old rules requiring court to decline consideration of the merits because of neglect to com-

ply with the rules. *Burke v. Canfield*, App. D. C. 1940, 111 F. (2d) 526." (Italics ours.)

"Liberality rather than restriction of interpretation should be the guiding rule in applying these rules. *Chemo-Mechanical Water Improvement Co. v. City of Milwaukee*, D. C. Wis. 1939, 29 F. Supp. 45."

In making use of this Federal Rule of Civil Procedure in the interpretation of the state statute, the Supreme Court of Arkansas violated that portion of the Federal Constitution providing for separation of powers between the state and federal governments, for it limited the application of a remedial statute passed by the Legislature of Arkansas (Section 8947 of Pope's Digest) by its interpretation of Rule 60B of the Federal Rules of Civil Procedure. It is a well recognized principle of our federal form of government that those powers not expressly delegated to the Federal Government and not granted to it by necessary implication, are reserved to the state governments. (*Constitution of the United States of America*, Revised and Annotated, Senate Document 232, 74th Congress, 2nd Session, pages 60, 61). The power to pass and enforce remedial statutes of limitations and procedure, such as the Arkansas nonsuit statutes, are clearly reserved to the state governments and any federal statutes seeking to limit application of such statutes in specific cases would be unconstitutional as it would be beyond those powers delegated to the federal government.

In the present case, however, there is no doubt but that Congress did not intend the Federal Rules of Civil Procedure to operate in such a manner. The federal statute specifically limits the application of the rules to be established as follows:

"Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." (28 U. S. C. A. Sec. 723B)

The attempt of the Supreme Court of Arkansas to apply this rule to the nonsuit statute obviously greatly reduces the substantive rights of the petitioners in this case and therefore the use made of this rule by the Supreme Court of Arkansas is not only unconstitutional, but is unauthorized by the statute itself. Petitioners' right to a Writ of Certiorari could well rest on this ground alone under the principle announced in *Nutt v. Knut*, 50 L. Ed. 348, 200 U. S. 12. In Headnote 1 of that case, it is stated:

"A party who insists that a judgment cannot be rendered against him consistently with the statute of the United States may be fairly held, within the meaning of U. S. Rev. Stat. Sec. 709, U. S. Comp. Stat. 1901, p. 575, providing for writs of error from the Supreme Court of the United States to the state courts, to assert a right and immunity under such statutes, although they may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

POINT C

Violations of the "Due Process" Clause

Three of petitioners' issues are directed to this point and for convenience and clarity, we will separate this point into three subdivisions.

1. REFUSAL OF THE SUPREME COURT OF ARKANSAS TO DETERMINE WHEN THE NONSUIT WAS SUFFERED IN FEDERAL COURT.

It will be remembered that this cause has never been heard on its merits. The hearings in the state courts, which form the basis for petitioners' petition for Writ of Certiorari, were on a demurrer based on the Arkansas nonsuit statute which provides a period of one year after a nonsuit is suffered in which to bring a new action.

Bearing this in mind and examining the record in the Columbia Chancery Court and in the Arkansas Supreme

Court, we find that one major issue was presented to the Arkansas Supreme Court; i.e., "when was the nonsuit in Federal Court suffered?" If it be deemed to have been suffered at the time of any proceeding prior to that of February 28, 1946, at which time the District Court denied appellants' motion to amend their pleading so as to state jurisdiction, then the action was barred by the statute of limitations. If, on the other hand, the nonsuit be found to have been suffered on or after the said denial by the District Court of Appellants' motion to amend, then, the action in the state court was timely and trial on its merits should have been allowed.

The Constitution and statutes of Arkansas provide for an appeal to the Supreme Court of Arkansas as a matter of right. The right of appeal may not be withheld from any litigant, and with that right goes the right to have the cause *determined* by the Supreme Court of Arkansas. In the present case, however, the Supreme Court of Arkansas, although affirming the lower court, stated:

"If (the decision of the U. S. Circuit Court of Appeals on August 8, 1945 is) treated as a nonsuit—*an issue we do not decide*—more than a year elapsed before the Chancery suit was filed in September of the following year." (R. 73) (Italics ours)

Inasmuch as the Supreme Court of Arkansas, *by its own language*, specifically stated that it did not decide the *only issue* presented in this case and the issue upon which the case was determined contrary to petitioners' interests, *the effect has been to deny to petitioners the right of appeal to the Supreme Court of Arkansas*. The Supreme Court, *without determining the only issue before it*, affirmed the action of the Columbia Chancery Court, and in so doing, it deprived petitioners of their property without the benefit of the process of law provided under the Constitution and

statutes of the State of Arkansas. This deprivation constituted a violation of the Federal Constitution, inasmuch as it deprived petitioners of their property without due process of law.

In regard to this point, it should be remembered that the violation occurred not in the lower court, but in the Supreme Court of the State of Arkansas. The violation, and therefore the constitutional ground, did not appear in the record until the rendition of its opinion by the Supreme Court on January 19, 1948. Petitioners urged this point in their petition and brief for rehearing, which was the first time after the point arose that they had the opportunity to argue the point, and therefore, their presentation of this issue was timely.

2. THE MINORS' PROPERTY RIGHTS.

Two of the plaintiffs herein, Patsy Marie Gilbert and Betty Jean Gilbert, are minors. Section 8918 of Pope's Digest of the Statutes of Arkansas provides that actions to recover interest in land must be brought within seven years, if at all. Under Section 8939 of Pope's Digest, the disability of minors is recognized and they are given, in addition to the seven year period, three years after they become twenty-one years of age within which to bring an action involving real property. Under these statutes the rights of minors in real property are not barred by limitations without a trial of their cause of action on its merits until three years after they become twenty-one years of age. (In construing this statute, the Supreme Court of Arkansas has held that as to female infants, the period of limitations starts to run after her eighteenth birthday. *Brake v. Sides*, 95 Ark. 74.)

Plaintiffs urged this point in their amended and substituted complaint in equity filed in the Columbia Chancery

Court (R. 40 et seq) but in the findings and decree of that court (R. 62 et seq and 66 et seq) no mention of this point was made although the plaintiffs are clearly shown in the decree (R. 66) to be minors. The point was again urged in Petitioners' brief before the Supreme Court of Arkansas (page 39 of petitioners' reply brief) and again the point was completely ignored, this time by the Supreme Court of Arkansas.

In Petitioners' petition for rehearing, directed to the Supreme Court of Arkansas, Point 9 specifically urged that the "court overlooked any mention of the fact that plaintiffs, Patsy Marie Gilbert and Betty Jean Gilbert, were and are minors, and, under the law in the State of Arkansas, are entitled to the tolling of the general statutes of limitations until three years after they reach their majority, unless an action is brought in their behalf and tried on its merits prior to that limit. Inasmuch as the court did not mention these facts in its opinion, we must assume that the court overlooked these important facts in making its decision."

Inasmuch as the petition for rehearing was denied without a written opinion, the state courts have completely ignored the rights assured to minors under the laws of Arkansas, and to thus take from them their property rights without any litigation whatever thereof, is to deprive them of their property without due process of law in violation of the Constitution of the United States of America.

3. DENIAL OF THE BENEFITS OF THE NONSUIT STATUTE TO PETITIONERS.

In its opinion, the Supreme Court, without giving any valid reason therefor, denied to these petitioners, who were appellants therein, the benefits of the nonsuit statute as digested in Section 8947 of Pope's Digest, and in its denial to them of the benefits of this statute, it foreclosed

their rights in the property involved in that action. To thus deprive them of their property without granting to them the benefits of a statute granted to other citizens of the State of Arkansas constituted a denial to them of the equal privileges and immunities of other citizens of the State of Arkansas, and served to take from them their property without due process of law.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, in order that the judgment and decree of the Chancery Court of Columbia County, Arkansas and the decision and judgment of the Supreme Court of Arkansas may be corrected, and that, to such an end, a Writ of Certiorari should be granted, and this court should review the decision of the Supreme Court of Arkansas and the record on which it is based, and finally reverse that decision and order that petitioners be given a trial of their cause of action on its merits.

Respectfully submitted,

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